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No. 09-34

IN THE

Supreme Court of the United States

PFIZER INC.,
Petitioner,

v.

RABI ABDULLAHI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondents' opposition does not dispute the importance of the questions presented for U.S. companies doing business abroad. The opposition merely suggests that the case involves narrow factual circumstances and that the circuits are not really split on the questions presented. Neither is true.

The decision below reaches two important questions with broad application to a wide range of cases under the Alien Tort Statute ("ATS"), 28 U.S.C. 1350. The Second Circuit allowed Respondents' ATS complaints to proceed based upon only the most conclusory and general allegations of involvement by

the Nigerian government, or alternatively on the ground that private actors may be sued under the ATS without any state action at all. Both rulings have grave implications for a host of other ATS suits beyond this one against U.S. corporations doing business abroad.

Both rulings likewise give rise to or deepen well-defined circuit splits that require this Court's resolution. *First*, the Second Circuit decision conflicts with decisions of other circuits on how plaintiffs must allege and prove the state action required for most ATS claims. *Second*, the Second Circuit decision conflicts with the decisions of other circuits on the scope of the narrow category of international law norms that might be enforceable under the ATS against purely private actors. Respondents fail to refute the existence or importance of either split.

At the outset, it should be noted that Respondents are wrong to suggest (Opp. 6 n.4) that certiorari should be denied because they may "release their claims" and thus moot the case. Respondents have *not* done so, nor should they be allowed to defeat review merely by the prospect that they could release their claims, knowing that they would no longer have as much of an incentive to do so if certiorari is denied. The questions presented in the petition remain live and squarely before this Court.

I. RESPONDENTS DO NOT DENY THE NATIONAL AND INTERNATIONAL IMPORTANCE OF THE ISSUES RAISED BY THE PETITION

Respondents attempt (Opp. 12-13, 20-21) to characterize this case as limited to the narrow circumstances of clinical trials without informed consent. On

respondents' theory, because every recent ATS case merely involves the application of *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), to "highly unusual, and likely non-recurring, fact patterns" (Opp. 5-6), no ATS decision should ever be reviewed by this Court. Such a theory is untenable and in any event mischaracterizes this case. The questions presented here have implications for ATS litigation against a wide range of U.S. corporations doing business abroad. This is no more a narrow, non-recurring case about nonconsensual clinical trials than *Khulumani* v. *Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom. Am. Isuzu Motors, Inc.* v. *Ntsebeza*, 128 S. Ct. 2424 (2008), was a narrow, non-recurring case about South African apartheid.

Respondents offer no response to the petition's showing that the questions presented here have enormous national and international significance. As the petition explained (Pet. 25-29) and *Amicus Curiae* Chamber of Commerce of the United States elaborates (Chamber Br. 17-23), expansive interpretations of ATS jurisdiction like the one below "invite stigmatizing and vexatious lawsuits" that are disproportionately likely to be brought against U.S. corporations and that are "hard to dismiss even when firms have done nothing wrong" (*id.* 18).

The Second Circuit's decision greatly exacerbates these problems, as the petition and the Chamber (*id.*) further explain, by so attenuating the state action requirement that it allows "the vaguest allegations of links between corporations and states to transform private torts into international law-based causes of action" (see Pet. 14-19), and allows purely private actors to be sued under the ATS based on "all manner

of *non-binding* pronouncements, directives, declarations, and non-self-executing treaties" rather than on a narrow category of universally binding international norms (see Pet. 19-25).

The United States has previously suggested that such problems should lead this Court to resolve whether the ATS even applies extraterritorially. See Brief for the United States as Amicus Curiae in Support of Petitioners 12-16 in *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, No. 07-919. And *Amici Curiae* Washington Legal Foundation and Allied Educational Foundation further suggest (Br. 5-22) that such problems should lead this Court to consider whether ATS jurisdiction may be invoked against private corporations at all, and/or based on events that took place abroad. Respondents fail to address these arguments.

II. RESPONDENTS FAIL TO DISPEL THE CONFLICTS AMONG THE CIRCUITS CREATED OR DEEPENED BY THE DECISION BELOW

Remarkably, Respondents defend the Second Circuit's reinstatement of their complaints without a single citation to the complaints themselves, preferring to rely upon the Second Circuit's erroneous characterization of the complaints as "adequately alleg[ing] that the violations occurred as the result of concerted action between Pfizer and the Nigerian government" (Opp. 8, quoting Pet. App. 51a-52a). Such conclusory legal statements are exactly what this Court held insufficient to survive dismissal in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), a decision that Respondents tellingly omit to mention in their opposition. Nor do respondents refute the petition's careful analysis of the complaints' own language

(Pet. 3-4 & n.2), which demonstrates that respondents have failed to allege any specific facts capable of "'nudg[ing]'" this bare legal conclusion "'across the line from conceivable to plausible,'" *Iqbal*, 129 S. Ct. at 1951 (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)), under any state action standard other than the Second Circuit's own. The conflict between the Second Circuit's permissive state action standard and those of other circuits warrants this Court's review.

Moreover, contrary to respondents' argument (Opp. 14), the second question presented is not "merely academic." If this Court grants review and finds an insufficient basis for state action, it will necessarily have to decide whether the ATS allows judicial implication of a novel claim against purely private actors for nonconsensual clinical trials. The disagreement among the circuits as to how to resolve this question also merits the grant of certiorari.

A. The Circuit Conflict Over The Definition Of State Action Under The ATS

Respondents assert (Opp. 9) that "[t]he Second Circuit's decision in no way expands the concept of state actor under the ATS." This assertion is incorrect. As respondents do not dispute, the complaints "did not allege that any Nigerian government officials even knew about the non-consensual tests" (Pet. App. 103a (Wesley, J., dissenting)), much less compelled them as a matter of state plan or policy. By holding that a foreign government's general assistance to a private corporation is sufficient to sustain an ATS complaint, the decision below conflicts with the decisions of other circuits that require much more. Specifically, as the petition explained (Pet. 15-19),

the Eleventh Circuit requires that the foreign government know of the specific wrongful conduct alleged to violate international law, and the Ninth Circuit requires a state plan or policy to commit that conduct.[1] By dispensing with any such requirement, the Second Circuit decision conflicts with those of the Ninth and Eleventh Circuits.[2]

Respondents try but fail to reconcile the other circuits' ATS state action decisions with the decision below. Respondents mischaracterize the Eleventh Circuit's holding in *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005), as finding state action (Opp. 10-11) when it in fact dismissed all but one ATS claim—one in which a mayor, an undisputed state actor, was willing and active accomplice to the misconduct. As to the dismissed claims, Respondents correctly hypothesize that, "*if* the police had known what was going on," *i.e.*, the specific alleged wrongful acts of torture, "*Aldana* presumably would have found state action."

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[1] Respondents deny any conflict with the Fifth Circuit, observing (Opp. 11) that on appeal it did not address the state action holding in *Beanal* v. *Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997). But they do not refute that the *Beanal* district court decision, which the Fifth Circuit did not disturb, conflicts with the Second Circuit in dismissing an ATS complaint for failing to allege "what role, if any, the [state] played *in the challenged conduct*." *Id.* at 379 (emphasis added).

[2] Respondents mistakenly assert (Opp. 9) that petitioner has "proposed" the Eleventh Circuit's "'knowledge or participation' test." The petition in fact discusses the Second Circuit's conflict with *both* the Eleventh Circuit's knowledge-or-participation test *and* the Ninth Circuit's plan-or-policy test, either of which this Court might approve in lieu of the Second Circuit's toothless standard. See Pet. 16 (discussing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986)).

Opp. 11 (emphasis added). But in *Aldana*, as here, there was no such allegation that the state knew of the specific allegedly wrongful conduct; *Aldana*'s dismissal of ATS claims thus conflicts with the Second Circuit's decision.

Respondents fail in their effort to rewrite their complaints to satisfy the standard the Eleventh Circuit employed in *Aldana*. None of the five categories of allegations they enumerate (Opp. 8) in fact amounts to an allegation that Nigeria knew of or participated in the allegedly non-consensual nature of the clinical trial. Neither (1) exporting Trovan from the United States to Nigeria nor (2) providing Pfizer a hospital facility in which to conduct the test remotely alleges such knowledge. Nor does (3) assignment of government physicians to work with Pfizer do so, for as Judge Wesley explained (and the majority did not refute), "if Nigerian government doctors were somehow involved in the study, [Respondents] did not specify what role, if any, they played." Pet. App. 103a (dissent). As to (4) Nigeria's alleged backdating of an approval letter, Respondents undermine this allegation by alleging elsewhere "that the letter was in fact created by a 'Nigerian physician whom Pfizer says was *its* principal investigator,'" not a government employee. Pet. App. 100a n.18 (dissent) (emphasis added); see also Pet. 4 n.2. Finally, as to (5) Nigeria's alleged "silencing" of Nigerian physicians critical of the study, Respondents do not allege that such critics were specifically addressing the administration of Trovan without adequate consent nor that the government was actually censoring them. See *id.*

If *Aldana* were not already sufficient to establish an intercircuit conflict on the ATS state action stan-

dard, an Eleventh Circuit decision issued since the petition was filed makes the conflict between that court's and the Second Circuit's approach to state action even clearer. In *Sinaltrainal* v. *Coca-Cola Co.*, --F.3d--, 2009 WL 2431463, *9 (11th Cir. Aug. 11, 2009), the Eleventh Circuit held that ATS jurisdiction was lacking because there was "no suggestion" in the complaints that "the Colombian government was involved in, much less aware of, *the murder and torture alleged in the complaints*" (emphasis added). As the Chamber observes (Br. 12-14), such a requirement of tight links to state action also helps to ensure that U.S. corporations are not held liable for acts of their foreign subsidiaries, affiliates, or contracting partners.[3]

Respondents likewise fail (Opp. 10) to reconcile the decision below with the Ninth Circuit decision in *Abagninin* v. *AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008). Respondents correctly observe that the Ninth Circuit relied upon the Rome Statute's articulation of the state action requirement as dependent upon a state plan or policy, but miss the point that such reliance on this and other international law sources in *Abagninin* itself conflicts with the Eleventh Circuit's reliance on a domestic law source (42 U.S.C. 1983) for its requirement of knowledge or participation, and that the Second Circuit conflicts with both in relying on only the vaguest allegations of general governmental assistance. Even assuming *arguendo* that Respondents' complaints alleged that

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[3] And insofar as *Sinaltrainal*'s ATS analysis expressly relied on *Romero* v. *Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008), see *Sinaltrainal*, 2009 WL 2431463, at *9, it undermines Respondents' attempted distinction (Opp. 11 n.7) of *Romero* as a TVPA case.

the Nigerian government knew of the specific wrongful conduct, the complaints nowhere allege that Nigeria had a "plan or policy" (*Abagninin*, 545 F.3d at 742) to conduct clinical trials without informed consent; *Abagninin*'s dismissal of ATS claims thus conflicts with the decision below.

Respondents suggest that they could cure the deficiencies in their state action allegations by citing Pfizer's public statements. But Respondents mischaracterize those statements (Opp. 9) by omitting key language: "Pfizer continues to emphasize—in the strongest terms—that the 1996 Trovan clinical study was conducted with the full knowledge of the Nigerian government *and in a responsible and ethical way consistent with the company's abiding commitment to patient safety*." Press Release dated May 29, 2007, at http://media.pfizer.com/files/news/trovan_statement_may292007.pdf (emphasis added to words omitted by Respondents). Pfizer's statements thus cannot be construed as an admission that Nigeria knew that the study was being administered *without* adequate consent.

Respondents also argue (Opp. 12-13), citing *Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 531 U.S. 288, 296 (2001), that state action judgments are so "highly fact-dependent" that certiorari should not be granted. But *Brentwood* offers no help to Respondents: the factual nature of the state action inquiry did not prevent this Court from granting certiorari there to decide the appropriate legal standard, and in any event, *Brentwood* helps show that the decision below runs against the grain of lower court interpretations of state action, see 531 U.S. at 294 & n.1.

B. The Circuit Conflict Over Which International Law Norms May Be Invoked Under The ATS Against Purely Private Actors

Respondents assert (Opp. 14-17) that, even if state action were absent in this case, ATS jurisdiction would still be available against petitioner, a purely private actor, so long as a norm is "specifically defined" under international law. In so doing, respondents overlook the Second Circuit's conflict with other circuits that have held that, no matter how specifically defined as against state actors, only a narrow class of international norms—such as "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism" (RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404)—may be asserted under the ATS against purely private actors.[4] As the petition demonstrated, the Ninth, Tenth, and Eleventh Circuits all have declined ATS jurisdiction where claims were brought against private actors outside this narrow class—a class still narrower than the narrow class of ATS claims allowed by *Sosa* where, as in *Sosa*, state action is present. The decision below ignored any such limitation. See Pet. App. 92a-93a (dissent).

Respondents' effort to distinguish the conflicting circuit decisions is unavailing. Respondents seek to evade the Ninth Circuit's clear holding in *Abagninin*

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[4] Respondents do not even address the additional split among the lower courts (see Pet. 21-22), as to whether the Nuremberg Code supports a private right of action at all. And while respondents recite (Opp. 3-5) the non-Nuremberg Code sources relied upon by the majority below, they do not address the dissent's explanation why those sources are plainly insufficient. See Pet. 20-21 & nn. 7-10; Pet. App. 60a-61a (dissent).

that ATS jurisdiction for a claim of crimes against humanity may not be invoked against a purely private actor. 545 F.3d at 741. The Ninth Circuit explained, in a passage that provides particular insight on the Nazi-era Nuremberg Code invoked by the Second Circuit majority below, that "[t]he traditional conception regarding crimes against humanity was that a policy must be present and must be *that of a State*, as was the case in Nazi Germany." *Id.* (emphasis added). Here, by contrast, the Second Circuit majority transmuted a Nuremberg Code that was announced in the context of convictions of state actors into an international-law norm applicable to private actors. See Pet. App. 92a n.17 (dissent).

Respondents also assert that the Tenth Circuit's analysis in *Cisneros* v. *Aragon*, 485 F.3d 1226 (10th Cir. 2007), was merely "based on a *Sosa*-informed analysis" (Opp. 18), and thus did not turn on the defendant's status as a private actor. But the opinion clearly indicates otherwise, citing the seminal lower court decision (a prior decision by the Second Circuit) that held that only certain violations of norms of universal concern may be asserted against purely private actors. See 485 F.3d at 1231 ("A pre-*Sosa* circuit-court opinion reflected this limitation when it recognized ATS causes of action for war crimes and genocide but not 'torture and summary execution—when not perpetrated in the course of genocide or war crimes.'") (quoting *Kadic* v. *Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995)).

As to the Eleventh Circuit's *Aldana* decision, respondents misleadingly focus only upon the arbitrary detention and crimes against humanity claims, and ignore the torture claim. On that claim, the court clearly held that "[s]tate-sponsored torture, unlike

torture by private actors, likely violates international law and is therefore actionable under the [ATS]." 416 F.3d at 1247. The court went on to reject ATS jurisdiction as to all but one incident in which the plaintiffs alleged that the town mayor (clearly a state actor) actively participated. *Id.* at 1248-50. Here, by contrast, the majority allowed a claim for administering a drug trial without adequate consent to be asserted against a private actor in the absence of state action.

In short, Respondents cannot explain away the fact that other circuits, addressing torts no less subject to international law than the one asserted in this case *if committed by states*—sterilization of agricultural workers (*Abagninin*), sexual offenses (*Cisneros*), and torture (*Aldana*)—held that they may not be asserted under the ATS against private actors in the absence of state action. The Second Circuit below ignored this limitation and extended a norm announced against state actors (the Nuremberg Code) to private actors, without any particularized finding that a medical norm of informed consent is so universal and binding that it should join war crimes and genocide as among the few international law norms that may be asserted against private actors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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